SUPREME COURT, U. S.

No. ~~1723~~

Supreme Court of the United States

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1971.

70-181

ADOLPH BERKE,

Petitioner,

v.

LEHIGH MARINE DISPOSAL CORP.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

GEORGE J. ENGELMAN,
Attorney for Plaintiff-Appellant,
11 Broadway,
New York, N. Y. 10004

DICK BAILEY PRINTING SERVICE Telephone: (212) 447-5358

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971.

ADOLPH BERKE,

Petitioner,

v.

LEHIGH MARINE DISPOSAL CORP.,

Respondent.

Petition For Writ of Certiorari to The United States Court of Appeals For the Second Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York entered in favor of the respondent after the trial judge directed a verdict in favor of defendant at the conclusion of plaintiff's proof.

The Opinion of the Courts Below.

The decision of the United States District Court for the Southern District of New York by Judge Charles M. Metzner was delivered orally and is appended hereto (app. pp. 9); the opinion of the United States Court of Appeals for the Second Cricuit by Judge Waterman is appended hereto (app. pp. 10). A petition for rehearing and/or rehearing *in banc* to the United States Court of Appeals was denied on February 18, 1971 and is appended hereto (App. pp. 16-17).

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was decided and entered December 24, 1970 and is appended hereto (App. pp. 10).

Petition for rehearing was denied and entered on February 18, 1971 and is appended hereto. (16)

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C. Sections 1254(1) and 2101(c).

Questions Presented For Review

In a Jones Act–General Maritime Law Claim:

1. Must the plaintiff prove that he personally could not have rectified an unseaworthy condition before that condition could give rise to liability on the part of the vessel where a jury question was present as to causation?

2. Is the plaintiff wrongly deprived of his constitutional right to a jury trial where the District Court dismissed the action for failure of plaintiff's proof as to causation and the Court of Appeals rejected the District Court's reason and then affirmed the decision after imposing a new and heretofore unknown burden on the Plaintiff?

3. May a District Court direct a verdict against a plaintiff on the issue of maintenance and cure payments where documents in evidence indicate that after being discharged from the hospital, the plaintiff's sputum cultures indicated for the first time positive tubercule bacilli for which the plaintiff was declared not fit for duty, was readmitted and then placed on an anti-tuberculosis regimen as an outpatient for approximately one year, which resulted in arresting the tuberculosis infection?

Statutes Involved

The Jones Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U.S.C. 688, 46 U.S.C.A. 688. The Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. 51:45 U.S.C.A. 51.

The pertinent part of the Jones act, 46 U.S.C.A. 688, reads:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;***"

The pertinent part of the Federal Employers' Liability Act, 45 U.S.C.A. 51, provides that the employer shall be liable:

"*** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, ***."

Statement of the Case

The United States District Court below acquired jurisdiction as petitioner's suit is based on the Jones Act, 46 U.S.C.A. 688. The pretrial order charged that respondent's scow was unseaworthy in that the deck was not reasonably safe and that the scow was not equipped with proper handlines and life jackets. The complaint alleged that the defendant failed to furnish proper equipment, failed to enforce safe rules of seamanship and failed to warn plaintiff of the dangers and perils.

Because of his mental deterioration, plaintiff did not testify at the trial. His deposition was offered, but excluded by the trial judge on the ground that there was insufficient extrinsic evidence of his incompetence. The trial court refused to voir dire the plaintiff to ascertain this for himself.

At the end of petitioner's case, upon motion of the defendant, the Court dismissed the complaint on the grounds of the "failure of the plaintiff to show any proximate cause between any alleged unseaworthiness on the part of the vessel and the fact that the plaintiff was found in the water." The United States Court of Appeals for the Second Circuit affirmed, not on the ground set forth by the District Court[1] but rather on the grounds that "plaintiff failed to produce any evidence that the "S-3 was not equipped with hand lines and cleaning equipment which Berke could have used if he were so inclined."

Briefly stated, the facts of the accident are as follows:

Defendant, LEHIGH MARINE DISPOSAL CORP. owned and operated the barge S-3, and employed the plaintiff, A. B., as sole bargee on board. Plaintiff was hired by the trip, and was not a permanent employee of defendant.

Berke's job was to handle the tow line and operate the

1 and in fact stated "there was sufficient evidence to permit the jury to infer that he fell overboard because of the slippery condition of the deck and lack of handrails."

dumping equipment at sea. The barge was constructed in such a way that there was a walkway around the perimeter of the barge, three feet wide. This walkway allowed access to the dumping mechanisms at the different holds. It is customary for barges of this type to have hand lines or life lines along the walkway for the bargee to hold as he goes to the dumping controls. The S-3 was not equipped with such safety lines and the walkways were covered with "muck and dirt" on this particular voyage.

The barge was dumped at night, and sometime after daylight, while the tow was returning to port, Berke was seen working at the front end of the scow.

Approximately one hour later Berke was seen in the water by the men on the tug.

He was rescued and taken to the Marine Hospital at Staten Island. The accident occurred on March 6. When pulled from the water Berke was blue.

Petitioner was a patient at the hospital for approximately one month, and then discharged fit for duty. While a patient in the hospital, sputum cultures were obtained. Following the growth of the cultures and Berke's discharge, the sputum proved to be positive and he was readmitted and treated both as an inpatient and outpatient for an extended period of time.

No maintenance was ever paid to the petitioner.

Reasons for Allowance of the Writ

The Decision of the Court of Appeals for the Second Circuit imposes a new and extraordinary burden in Jones Act cases, which is in conflict, on the basis of law and fact, with the decisions of this Court and other United States Courts of Appeal. If left standing, it will adversely effect the Jones Act rights of seamen.

Relying on *Schlichter v. Port Arthur Towing Co.*, 288 F 2d 801 (Fifth Circuit) cert. denied 368 U.S. 838 (1961), the Court

of Appeals fashioned a new rule of burden of proof in seamen's cases, holding that the plaintiff should have produced evidence that the S-3 was without equipment which plaintiff could have used to remedy an unseaworthy condition before the question of causation between the unseaworthiness and the accident could be considered by the triers of the facts.

The Court of Appeals applied the holding in *Schlichter* to the facts in *Berke* which, if left undisturbed, flies in the face of *Grillea v. U.S.*, (2 Cir) 232 F2d 919, and *Mahnich v. Southern S/S Co.*, 321 U.S. 119 and *Waldron v. Moore-McCormack Lines*, 386 U.S. 724.

In *Schlichter*, the only claim of unseaworthiness rested on the inaccessability of life saving equipment which might have saved plaintiff's life. Schlichter kept the equipment in a locked place and had the key in his own pocket. The Court held that Schlichter's independent act of keeping the life saving equipment locked up sealed his (Schlichter's) fate and insulated the owners from liability. *Schlichter* relied on *Walker v. Lykes Bros.* SS Co. (2 Cir.) 1952, 193 F 2d 772, 1952 AMC 269. Footnote 3 in *Schlichter* at page 805 indicates that:

> "This case (Walker, supra) and the so-called 'primary duty rule' has been subject to considerable criticism, see *Boat Dagny, Inc. v. Todd* (1 Cir.) 155, 224 F2d 208, 1955 AMC 2083 which in turn rests largely upon the analysis made in *Louisiana and Arkansas R. Co. v. Johnson* (5 Cir.) 1954, 214 F2d 290, and its application has been severely limited, and *Mason v. Lynch Bros. Co.* 1956, 4 Cir., 228 F2d 709, 1956 AMC 394; *Spero v. S/S Argodon*, DCED Va., 1957, 150 F. Supp. 1, 1957 AMC 1056."

In its own circuit, the *Walker* case has been expressly distinguished, *Dixon v. U.S.* (2 Cir.) 1955, 219 F 2d 10. Which analyzed the principle as follows: (at page 16)

> "Those cases (*Walker, Great Northern*, etc.) are only instances of the firmly established rule that an employee may not recover against his employer for injuries

occasioned by his own neglect of some independent duty arising out of the employer-employee relationship. Their result turns really not upon any question of 'proximate cause,' 'assumption of risk' or 'contributory negligence,' but rather upon the employer's independent right to recover against the employee for the *non-performance* of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work. Such cases are quite inapposite here. Dixon was not guilty of any breach of duty to his employer." (emphasis ours)

The Court, in enlarging the holding in *Schlichter* to the facts in *Berke* imposes on every Jones Act seaman the burden of showing his freedom from the obligation and opportunity of rectifying the unseaworthiness before the vessel is liable for injuries resulting from that unseaworthy condition.

This holding is contra *Mahnich*, which held that for a vessel to be seaworthy, the equipment which is needed to attain that condition must be positioned and placed where it is normally required and expected to be; the mere fact that there was sound rope on board which might have been used, affords no excuse to the shipowner for failure to provide safe staging which failed and injured plaintiff.

Waldron v. Moore-McCormack Lines, 386 U.S. 724, held the vessel liable for unseaworthiness where inadequate manpower caused the unseaworthiness regardless of the fact that additional manpower was available on board but not employed. Indeed, actionable liability may arise even where the unseaworthiness arises from the conduct of the plaintiff himself. *Grillea v. U.S.*, (2 Cir.) 232 F 2d 919.

The Court of Appeals, in affirming the District Court's decision on grounds heretofore unknown, deprived petitioner of his Constitutional right to a jury trial, which is an integral and vital part of his remedy under the Jones Act. *Jacob v. City of New York*, 315 U.S. 752, 757, 758; *Lavender v. Kurn*, 327 U.S. 645, 652, 653.

POINT III.

There was sufficient evidence from which the jury could have found that plaintiff's tubercular condition was caused by his immersion, and that he should be entitled to maintenance for his periods of out-patient care for this condition.

In considering the question of maintenance, the Court, in its opinion, did not even mention plaintiff's tuberculosis. However, the evidence shows that while in the hospital following his immersion, a sputum culture was taken (147a); that when this culture was returned following plaintiff's discharge from the hospital, it was found to be positive for tuberculosis bacilli (153a); that plaintiff received additional in-patient and out-patient care because of this condition. Certainly, he was entitled to have a jury determine whether or not the proof justified an award for maintenance.

Conclusion

For the above reasons, a writ of certiorari should be granted as prayed for.

Respectfully submitted,

GEORGE J. ENGELMAN
Attorney for Petitioner
11 Broadway
New York, New York 10004

APPENDIX

Decision of United States District Court for the Southern District of New York Delivered Orally by Judge Charles M. Metzner

The Court: Mr. Foreman, and ladies and gentlemen of the jury.

As you heard, the plaintiff has rested, and in your absence we have had an argument on questions of law, and after hearing those arguments I have dismissed the complaint for failure of the plaintiff to show any proximate cause between any alleged unseaworthiness on the part of the vessel or any negligence on the part of the vessel, and the fact that the plaintiff was found in the water.

Absent such proof, the plaintiff has failed to sustain his prima facie case, and consequently I have dismissed the complaint.

You may return to the jury room downstairs, Room 113.

Thank you very much for your attention.

(Jury excused.)

Mr. Matthews: Your Honor, I wonder if I might only have the plaintiff's deposition marked as an exhibit.

The Court: Certainly.

Mr. Matthews: Thank you, your Honor.

(Plaintiff's Exhibit 2 marked for identification.)

Mr. Lynch: In light of your Honor's ruling, I now move to dismiss the third-party complaint as against my client, No. 17 Battery Place Corporation, No. 1, the owner of the tugboat.

The Court: The motion is granted.

Case closed.

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 170—September Term, 1970.

(Argued November 10, 1970 Decided December 24, 1970.)

Docket No. 33819

ADOLPH BERKE,

Plaintiff-Appellant,

—v.—

LEHIGH MARINE DISPOSAL CORP.,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and ANDERSON, *Circuit Judges.*

Appeal by plaintiff from a judgment, United States District Court for the Southern District of New York, Metzner, *J.*, entered on dismissal of the complaint at the close of plaintiff's case on the ground that there was insufficient evidence to go to the jury on the issues of negligence, unseaworthiness, and maintenance and cure. Affirmed.

PAUL C. MATTHEWS, JOHN F. X. McKIERNAN,
New York City, *for Plaintiff-Appellant.*

WILLIAM F. LARKIN, SCHAFFNER & D'ONOFRIO,
New York City, *for Defendant-Appellee.*

WATERMAN, *Circuit Judge:*

Plaintiff-appellant Berke commenced this action against his employer to recover damages resulting from personal injuries which he suffered when he fell overboard from the scow S-3 in Greater New York Harbor on March 7, 1965. His first cause of action was premised on the alleged unseaworthiness of the scow and, under the Jones Act, on the alleged negligence of the employer. His second cause of action was for maintenance and cure. Seeking indemnity, the employer impleaded the owner of the tug which was towing the S-3 at the time of the accident. At the end of plaintiff's case the trial judge granted defendant's motion to dismiss the complaint on the ground that there was insufficient evidence to take the case to the jury on either of the two counts. The propriety of that decision is the subject of this appeal.[1] We affirm the dismissal order.

The following sketch of the facts is undisputed. At about midnight on March 6, 1965, the scow S-3, owned and operated by the defendant-appellee, was berthed under the Brooklyn Bridge where it had been loaded with debris and was being prepared to be towed to sea by a tug operated by the third-party defendant. The scow was approximately 200 feet in length and 40 feet in width and contained four pockets in which the debris was heaped in cone-shaped piles. Around the pockets and along the perimeter of the scow ran a walkway approximately three feet in width. Plaintiff Berke was the scow's captain and was the sole crew member of the S-3.

When the tug arrived to take the S-3 out to sea, Berke and one Mullin, a deckhand on the tug and an old friend of Berke, made the necessary tie-up. After preliminary maneuvering in the harbor, the tug towed the S-3, secured by a line 400 to 500 feet long, to sea. Out at sea, the tug captain signaled Berke to open the doors at the bottom of the pockets in order to dump the debris into the ocean. Berke responded and, after the dumping, the tug with the scow in tow headed back to New York. After dawn, Berke was observed by Mullin scraping the No. 1 pocket

1 The third-party complaint was also dismissed but the propriety of that dismissal is not before us on this appeal.

with a long pole. Approximately fifteen minutes later, as the tug was approaching the Verrazano Bridge, the tug slowed in order to shorten the tow lines so as to pull the S-3 alongside for better maneuverability in the harbor. A signal was given for Berke to help in changing the ropes but he did not appear. Therefore, the S-3 was pulled in immediately astern of the tug, and Mullin was sent on board to find Berke and to handle the ropes in bringing the scow alongside. After the manipulating of the ropes had been accomplished and after a search of the scow for Berke had proved fruitless, Mullin observed something, which turned out to be Berke, splashing in the water some distance astern of the scow. Berke was rescued and taken to the Marine Hospital on Staten Island, where he was treated for penumonia and congestive heart failure. He was discharged on April 2, 1965, with the notation "Fit for duty." Since that time, Berke, then 65, has allegedly suffered marked physical

Plaintiff contends in his first cause of action that he fell overboard as a result of an alleged lack of equipment to clean the muddy debris off the deck of the scow and the alleged absence of a hand line around the perimeter of the boat. However, apparently because of his deteriorated mental state, Berke, though present in court during the trial, did not testify and Mullin was plaintiff's sole witness on the issues of negligence and unseaworthiness. In support of plaintiff's claims, Mullin testified that there was no hand line in place on the S-3 when he was helping Berke tie up under the Brooklyn Bridge on March 6, 1965, or on previous occasions; that at these times he had not seen the customary equipment for cleaning off the deck; and that he himself had slipped on the deck of the S-3 during Berke's rescue. However, the testimony as to the lack of cleaning equipment was stricken because Mullin had traversed only part of the S-3's perimeter that night and because he had not been looking for the equipment on any of the occasions mentioned. On cross-examination Mullin admitted that it was customary for hand lines to be removed during loading and that

he was not surprised when he did not see them in place when the tug was made fast to the barge under the Brooklyn Bridge.

The trial judge's exclusion of Mullin's testimony relative to cleaning equipment was proper inasmuch as, under the circumstances, Mullin's testimony amounted to no more than a statement that he did not know whether such equipment was on the S-3. Nor does Mullin's testimony as to the condition of the scow at the time of Berke's rescue supply the evidence needed to show the alleged lack of cleaning equipment and hand lines. As Berke was the sole crew member of the S-3, an absence of hand lines from the deck perimeter and a slippery condition of the deck evidenced Berke's own failure to perform his duties as scow captain if the proper equipment were in fact available to be used by him. While we agree with the plaintiff that there was sufficient evidence to permit the jury to infer that he fell overboard because of the slippery condition of the deck and the lack of hand lines, see *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523 (1956), plaintiff failed to produce any evidence that the S-3 was not equipped with hand lines and cleaning equipment which Berke could have used if he were so inclined. In *Schulz* there was evidence of the defendant's negligence and the Court there was concerned solely with whether that negligence was a cause of the drowning. Here, though, counsel, through more thorough discovery, could have obtained further information as to the presence or absence of proper equipment on the S-3. He did not do so, and without this added proof the jury, having been left to pure speculation on the issue of negligence and unseaworthiness, could never have reached the issue of causation. See *Schlichter v. Port Arthur Towing Co.*, 288 F.2d 801, 804-805 (5 Cir.), *cert. denied*, 368 U.S. 828 (1961). Although the trial judge dismissed the action for failure of plaintiff's proof as to causation, we can and do affirm on the separate ground[2] that there was

2 It is well settled that an appellate court may affirm a correct result reached below even though an erroneous reason for the decision was given by the lower court. See, e.g., *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); *S & S Logging Co. v. Barker*, 366 F.2d 617, 623 (9 Cir. 1966).

insufficient proof to go to the jury on the question of negligence and unseaworthiness.

Plaintiff also complains that the trial judge made an adverse inference from Berke's deposition, offered in lieu of witness-stand testimony, should have been admitted into evidence. However, on the grounds we have above stated, a directed verdict would have been proper even without an adverse inference. Counsel offered no competent testimony to prove that Berke was incompetent to testify at the trial and, without such a foundation, Berke's deposition was inadmissible. Rule 32(a)(3) [formerly Rule 26(d)(3)], F. R. Civ. P. In any event, had it been admitted, the deposition, in which Berke narrated circumstances, uncorroborated and incapable of being corroborated, concerning vessels in the vicinity of the S-3 at the time of the accident, would have been of little value to plaintiff's case for this imaginative narration would seem to demonstrate that Berke apparently was not fully competent even at the time of the deposition.

On the issue of maintenance and cure, one Dr. Reichman, who had twice examined Berke solely for the purposes of trial, testified on the basis of these two examinations and Berke's hospital record. On cross-examination he admitted that all of Berke's ailments listed in the hospital reports for the hospitalization immediately following the accident, except for his aggravated bronchitis, pre-existed the accident or were cured upon Berke's discharge from the Marine Hospital on April 2, 1965. As to the aggravated bronchitis, he testified that further treatment would only relieve the symptoms but would not permanently improve the condition. On this testimony there was no evidence on which the jury could have inferred that

Berke had not reached maximum cure[3] upon the April 2 discharge from the Marine Hospital and the directed verdict on this count was properly entered.

Affirmed.

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3 A seaman is not entitled to "cure" past the point at which his condition cannot be further improved. *Farrell v. United States*, 336 U.S. 511 (1949); *Fitzgerald v. United States Lines Company*, 374 U.S. 16, 19 n. 7 (1963); *Travis v. Motor Vessel Rapids Citiees*, 315 F.2d 805, 810-811 (8 Cir. 1963); *Desmond v. United States*, 217 F.2d 948, 950 (2 Cir. 1954), cert. denied, 349 U.S. 911 (1955); *Stewart v. Waterman S.S. Corp.*, 288 F. Supp. 629, 634 (E.D. La. 1968), aff'd, 409 F.2d 1045 (5 Cir. 1969), cert. denied, 397 U.S. 1011 (1970). We point out that we are aware that the Third Circuit has recently expanded the definition of "cure" to include those situations where, as here, the plaintiff could receive out-patient palliative treatment for a permanent condition, *Neff v. Dravo Corp.*, 407 F.2d 228 (3 Cir. 1969), and that we have not overlooked that decision.

Decision Denying Petition for Rehearing

33819
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ADOLPH BERKE,

Plaintiff-Appellant,

v.

LEHIGH MARINE DISPOSAL CORP.,

Defendant and Third-Party
Plaintiff-Appellee,

17 BATTERY PLACE NO. 1 CORP., SUCCESSORS IN INTEREST TO DAIZEL TOWING COMPANY, INC.,

Third-Party
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. Edward Lumbard
Sterry R. Waterman
Robert P. Anderson
Circuit Judges

February 18, 1971

Decision Denying Petition for Reheaing In Banc

33819

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ADOLPH BERKE,

Plaintiff-Appellant,

v.

LEHIGH MARINE DISPOSAL CORP.,

Defendant and Third-Party
Plaintiff-Appellee,

17 BATTERY PLACE NO. 1 CORP., SUCCESSORS IN INTEREST TO DAIZEL TOWING COMPANY, INC.,

Third-Party
Defendant-Appellee.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

February 18, 1971

SUPREME COURT, U. S.
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JUN 12 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

70-181

No. ~~1723~~

ADOLPH BERKE,

Petitioner,

—against—

LEHIGH MARINE DISPOSAL CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SCHAFFNER & D'ONOFRIO
Attorneys for Respondent
123 William Street
New York, New York

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IN THE

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No.

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—against—

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Issues

1. Whether the Court of Appeals correctly held that the plaintiff had not sustained his burden of producing sufficient proof that the condition of the barge from which he fell constituted unseaworthiness or was the result of negligence chargeable to his employer, the owner of the vessel.

2. Whether the determination of no proof of unseaworthiness or negligence rendered moot a decision on causation.

3. Whether the clear, undisputed and definitive evidence required a directed verdict on the issue of maintenance and cure.

Facts on Liability

Adolph Berke was the captain and the only member of the crew of the dump scow S-3 (46a).* At about midnight (95a) before the accident, the subject scow was loaded by a process involving the dumping of building debris from above into its pockets (42a, 97a). When the holds were completely filled the deck of the scow was either a little below (100a, 101a) or a little above (98a) the one foot height of the tug's deck to which it was attached (101a) and the load stood in a cone shape five or six feet above the top of the pockets (50a, 96a). The operation of loading normally involved some stray material landing on the walking deck (42a) which had a width of three feet and extended around the perimeter of the entire vessel (50a). It was admitted in the plaintiff's case that the cable type handline running around the outside of the deck of the scow (40a-41a) customarily was dismantled and removed during this type of a loading process to avoid damage so that such handrails were not expected to be seen in place that night just after loading (97a-98a).

The plaintiff's witness testified that when he went aboard this scow on the night before the accident, he only walked over one part of the deck—not the entire deck (45a). Since he did not look for either a broom or

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* References are to pages in the Appendix.

a squeegee aboard the S-3 at that time, he could not tell the Court whether it was equipped with those implements or not (44a-45a). He testified that a squeegee or broom was acceptable equipment for cleaning down the deck (42a-43a) and that it was the duty of the barge captain to brush the debris overboard off the deck so that it could be walked upon (43a-44a).

Plaintiff's witness, the tug's "mud man", attested to the fact that when he spoke to Mr. Berke that night he was in good healh, in full possession of his faculties and performed his functions in a seamanlike manner (47a, 48a, 49a).

Later that night the scow was observed being emptied by the plaintiff in a seamanlike manner (51a, 101a-102a). He was again seen working on board the barge after daybreak (102a). It was within an hour thereafter (102a-106a) that Adolph Berke was discovered to be missing from the vessel (52a-54a). He was found in the water some couple of hundred feet away (54a, 111a).

Joseph Mullin, the tug "mud man", was the only fact witness to the circumstances preceding and subsequent to Adolph Berke's fall from the scow. Only the plaintiff himself could recount the facts of his accident. The petitioner's brief states, on page 4, that because of his mental condition at the time of trial, plaintiff did not testify. The plaintiff's deposition was offered after he had rested his case but it was excluded by the trial judge on the ground that there was insufficient evidence of his incompetence. It is apparent that the petitioner is now claiming that the plaintiff, although incompetent to testify at the time of trial, was lucid when he testified in his deposition. That transcript of the deposition was marked Plaintiff's Exhibit 2 for identification and was presented to the Trial Court. The description of the accident given by the plaintiff therein is as follows:

"A. We are towed back in the morning. I went up forward and I seen a light in front of me.

Q. A light in front of you? A. A lighter, a red one, 51 or 55 something like that.

Q. Was that the number on the lighter? A. Yes, it was over 500, a red one.

Q. 51? A. 551 or 552, something like that.

Q. What color was the lighter? A. Red.

Q. How big was it? A. I would say it's at least 14,000 tons. It might carry 10,000 or 30,000, something like that. One of the big ones. He was picked up at night.

Q. It was picked up at night? A. Yes.

Q. At what time? A. I don't know, because I was sleeping." (p. 14-15).

* * *

"Q. Did you throw a hawser? A. No. I was in bed. When he put that on, I was sleeping. In the morning I woke up, I seen it. I went up forward. I say 'How the hecks did he get there?'

Q. Did you talk to him? A. No, he don't talk to you. You are only a bum when you are a scow captain. I say, 'How the hecks did he get in.' When I stood up to watch, to go aft, the harbor goes in a circle and it swings out, and when it swung around they hit my corner.

Q. Who hit your corner? A. I don't know. The scow was a little bit slippery on deck and I fell overboard.

Q. Who hit your corner, was that the scow that hit your corner or the lighter? A. The lighter.

Q. Hit your corner? A. Yes.

Q. Was the lighter tied up to the tug also? A. Yes.

Q. Where were you on the scow when you fell overboard? A. I was up forward.

Q. Were you on the port or starboard side of the scow? A. On the port side.

Q. Where was the lighter attached, the forward portion of the scow? A. Forward." (p. 16-17)

* * *

"Q. How many barges or scows did he take out with him? A. He only took one dumper out.

Q. One dumper? A. That's all." (p. 36)

Q. As soon as you finished dumping, did you go to bed? A. No, sir.

Q. What did you do next after you finished dumping? A. I tried to go to my bed. Here, for instance, that's the end of the scow. I dump it and—

Q. You are on the wrong drawing. Go down to number two. A. I put the dumper out, then I go aft, midships where I live, and when I go there the tow boat, the barge hit my corner and you only got so much to walk on. Then he hit the corner and over the side I went.

Q. Did that happen right after you dumped your cargo? A. No—yes, right after.

Q. Right after? A. No, not right after. Maybe an hour or two hours." (p. 41).

Q. When you came up in the morning, where were you, where was the scow and the tow? A. It was outside New Jersey there.

Q. Whereabouts? You can tell me where in Jersey. A. He passed the—

Q. Swinburne Island, Hoffman Island, Sandy Hook? A. That was under the Coast when that happened, on the Jersey Coast, and when I came up in the morning, so I look up. I see a boat in front of me. So I went up. When I went up there,

and the curve goes around, when he curved, this scow, here, the lighter I would say, not the lighter —that lighter, that corner hit me here." (p. 43)

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Facts on Damages

The discharge diagnosis for Adolph Berke's confinement to the United States Public Health Service Hospital immediately after the accident was that he was fit for immediate duty (86a).

Adolph Berke had a history of tuberculosis before his immersion on March 7, 1965 (80a). It is true that the hospital record for that initial March-April 1965 confinement shows that sputum samples taken during his stay then were developed after his discharge and proved positive (86a), requiring his recall to the hospital on June 1, 1965 for observation (88a). However, on Mr. Berke's return to the hospital twelve different sputum cultures were taken from him and they all proved negative (88a). Upon that basis and his examinations of the plaintiff, the plaintiff's medical expert witness told the Court that in his professional opinion any tubercular condition which Mr. Berke had probably cured itself at some time after the original sputum tests had been taken during the earlier admission to the hospital (90a-91a).

As a result of the two physical examinations which the plaintiff's medical expert conducted on Adolph Berke on April 19, 1966 and April 17, 1969 for the purpose of testifying in conjunction with a review of the hospital record (Plaintiff's Exhibits 1 and 1A) (74a, 75a) the only objective finding he made was that the plaintiff exhibited marked shortness of breath while putting on his shirt (73a). The doctor stated on the witness stand that all con-

ditions diagnosed either pre-existed the accident of March 7, 1965 or were cured in the hospital confinement of March to April 1965 with the one single exception of a bronchial condition which he said was worse after the accident (82a). With reference to that one condition the doctor testified that Mr. Berke had attained maximum recovery when he left the hospital on April 2, 1965 and that any subsequent treatment needed for the bronchial condition was limited to therapy and containment (71a-73a).

POINT I

There is no justification for a review of the decision of the Court of Appeals in this case on the issues of negligence and unseaworthiness.

There was never any proof in this case that the S-3 was inadequately manned. The testimony of plaintiff's witness affirmatively shows that on the day of the accident Adolph Berke was an experienced seaman in excellent physical and mental condition sufficient to perform his duties. As the sole officer and member of the crew of this dump scow, Mr. Berke was in complete charge and control of it and had the exclusive duty to keep it maintained in a seaworthy condition. Uncontested on this petition is the evidence presented by plaintiff's witness showing that this plaintiff's responsibilities included sweeping the debris off the decks and replacing the rope handlines around the scow after the drop-dumping type loading operation had been completed.

On trial the plaintiff's witness could not tell the Court whether or not the scow was equipped with the standard equipment of a replacable handrail or a squeegee or broom. Incidentally, the deposition taken before trial of Adolph Berke (Plaintiff's Exhibit 2 for identification) which the

petitioner's brief contends should have been admitted into evidence on the claim that at the time it was taken the plaintiff was perfectly lucid, provides absolutely no testimony from which a finding could be made that there was any absence of squeegee, broom or handrail on this vessel. This case was not the situation, as it was in *Schulz v. Pennsylvania Ry. Co.*, 350 US 523, of the plaintiff dying or becoming mentally incompetent as an immediate cause of the accident where there was no way to ascertain exactly what happened. Here the plaintiff's attorney had an opportunity, and did actually exercise it, to depose his client before trial and develop all of the facts upon which the case relied. The Trial Court examined this deposition before it made its ruling to determine whether there was any probative evidence in it and the Court of Appeals did the same before it made its determination.

Accordingly, the determination of the Court of Appeals that the plaintiff failed to produce any evidence that the S-3 was not equipped with hand lines and cleaning equipment which Berke could have used if he were so inclined should be held to be proper.

The plaintiff has the burden of producing evidence to establish at least *prima facie* that a condition was in existence which could be found to be unseaworthy (*Manhat v. United States*, 220 F 2d 143, 146, cert denied 349 U.S. 966). The petitioner's brief complains that he should not have been expected to establish the framework of facts referable to proving the absence of equipment required as a foundation for a finding of whether or not such a condition which would have existed had the equipment been proved missing was unseaworthy. Such legal reasoning would permit a verdict not only on speculation based upon facts proven but upon pure arbitrary decision without any conceivable relationship to evidence or its absence. In the absence of proof of a condition upon which

a finding of unseaworthiness can be predicated, the barge owner would be subject to absolute liability without any other showing than that an accident occurred aboard this vessel.

It is submitted that the law is definitive that the single member captain-crew of a vessel does not have a cause of action against his employer for injuries he incurred as a sole and direct result of his own failure and neglect to perform the very specific duty for which he was employed and for the purpose for which he was on board (*Great Northern* v. *Wiles*, 240 U.S. 444; *Schlichter* v. *Port Arthur Towing Company*, 288 F. 2d 801, cert. denied 368 U.S. 838; *Walker* v. *Lykes Bros. SS Co.*, 193 F 2d 772, 774, 775). The only evidence before the Court brings Adolph Berke clearly within the purview of this standard.

It is interesting to note that Plaintiff's Exhibit 2 for identification which the plaintiff's attorney so eagerly sought to substitute on trial for Adolph Berke's live testimony not only did not make the slightest reference to absence of equipment aboard the S-3 but the plaintiff there testified to the fact that his falling overboard was proximately occasioned by an altogether different event from that which his attorney was attempting to prove on trial. In that deposition, taken at a time his attorney insists the plaintiff was lucid, Mr. Berke told that he was caused to be thrown overboard as a result of a collision between his scow and another scow in the tow of the tug. Aside from the indication that a new and different theory of liability and a new set of facts were presented on trial as compared to what the only eye-witness to the event, the plaintiff himself, had related in his deposition to his attorney as well as to the other parties to the action and to the Court, it must be accepted that, if this deposition of Adolph Berke were to have been improperly excluded, it would not have added a single element of evidence to support the struc-

ture of the plaintiff's burden of proof and would have cast grave suspicion as to whether the case attempted to be made on trial was totally different from the facts as Adolph Berke, the only witness to his own accident, experienced them.

It is respectfully submitted that the findings and holdings of the Second Circuit Court of Appeals in affirming the determination of the Trial Court were correct and proper in all respects and firmly supported by the evidence. Therefore, its decision should not be subjected to further review.

POINT II

There is no justification for a review of the decision of the Court of Appeals on the issues of maintenance and cure.

The petitioner here seeks to have this Court upset the determination of the Court of Appeals based solely upon the fact that the hospital records of Adolph Berke show that while he was hospitalized between March 7, 1965, the date of his accident, and April 2, 1965, the date of discharge, a sputum culture was taken which was not developed until after he was discharged from the hospital. Then the earlier taken specimen was found to be positive for tuberculosis bacilli. Those facts, taken out of context from the record, are offered by the petitioner as the sole reason for his contention that the Trial Court should not have directed a verdict against Adolph Berke on the issue of maintenance and cure.

The petitioner ignores his own evidence which absolutely precludes such a contention:

1. The hospital record shows that on April 2, 1965, Adolph Berke was declared fit for immediate duty on that date (82a).

2. The plaintiff's own medical expert who reviewed the hospital records and examined the plaintiff (61a) testified that the plaintiff most likely had tuberculosis before his March 7, 1965 accident (80a), that the tuberculosis condition probably cured itself sometime after the sputum specimen had been taken and before the positive reaction was developed (90a-91a), that because of the result of the test the plaintiff was returned and committed to the Public Service Hospital, only for observation, on June 1, (87a) when twelve separate sputum cultures were taken and every single one of them proved negative (88a).

3. The same plaintiff's medical expert unequivocally stated to the Court that the plaintiff had reached maximum recovery when he left the hospital on April 2, 1965 and that any subsequent treatment or medication was for therapy and containment (71a-73a).

It is respectfully submitted that upon this evidence the Trial Court had no other alternative than to direct a verdict against Adolph Berke.

This selective focusing upon isolated, incomplete excerpts from the record by the petitioner in support of his contention on the issue of the propriety of the Court's decision as to maintenance and cure is indicative of the type of argument utilized in all aspects of this application for a Writ of Certiorari. Short of blind faith acceptance of the accuracy and completeness of the petitioner's presentation of the contents of the record on appeal, it can

be clearly seen that there are no merits for this application for a review of the determination of the United States Court of Appeals for the Second Circuit in this action. That determination was sound in law and firmly founded upon the plaintiff's own clear and unequivocal evidence.

CONCLUSION

The request for a Writ of Certiorari should be denied.

Respectfully submitted,

SCHAFFNER & D'ONOFRIO
Attorneys for Respondent
123 William Street
New York, New York